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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1941

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, Sampson Tulee, a Yakima Indian, presents this statement particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon this appeal to review the judgment in the Supreme Court of the State of Washington in the above entitled case affirming appellant's conviction for a misdemeanor in the Superior Court of the State of Washington for Klickitat County.

DATES OF FINAL JUDGMENT BELOW AND OF THIS APPLICATION FOR APPEAL

The case was heard and decided below by the Supreme Court of the State of Washington

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sitting *en banc*. This was the highest court in the state in which a decision could be had; and the judgment affirming appellant's conviction and sentence was dated and has been in force as a final judgment since April 2, 1941. (*Puget Sound Power & Light Co.* v. *County of King*, 264 U. S. 22.) Since this application for appeal is being presented to June 30th, 1941, its timeliness is established under Section 8 (a) of the Act of February 13, 1925, c. 229, as amended. (43 Stat. 936, 940; 28 U. S. C. 350.)

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Section 237 (a) of the Judicial Code of the United States (28 U. S. C. 344 (a)), as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936), by the Act of January 31, 1928, c. 14 (45 Stat. 54), and by the Act of April 26, 1928, c. 440 (45 Stat. 466), provides the statutory basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The clause in the said Section 237 (a) particularly relied on is the one which refers to cases

> where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *.

STATE STATUTE INVOLVED

The state statute, the validity of which is involved, is referred to in the record as Section 5703

of Remington's Revised Statutes of Washington (vol. 7, 1940 pocket supp.) and will for convenience be referred to hereinafter as "Section 5703." This is a codification of Chapter 149 of the Session Laws of the State of Washington of 1937 (1937 Wash. L., pp. 529–534), which, so far as pertinent, provided:

> SECTION 1. That section 51 of chapter 31 of the Laws of 1915 as amended by section 1, chapter 63 of the Laws of 1921 be amended to read as follows:
>
> SECTION 51. Licenses herein required shall be issued to any qualified person, firm, or corporation, by the director of licenses, or his duly authorized deputy, upon the receipt of a lawful application therefor, upon a blank to be furnished for that purpose, accompanied by the receipt of the state treasurer for the required fee, and the director of licenses shall cause to be endorsed on such application the number of the license issued and the date of issue, and transmit the application to the director of fisheries. All applications for licenses shall be filed with the state treasurer accompanied by the proper fees, which shall be respectively as follows:
>
> * * * * *
>
> For each dip bag net license for the taking of salmon on the Columbia River, five dollars ($5.00);
>
> * * * * *

SEC. 2. This act is necessary for the support of the state government and its existing public institutions, and shall take effect March 31st, 1937.

UNITED STATES TREATY INVOLVED

The treaty invoked by appellant is the one concluded June 9, 1855, between the United States and a group of confederated tribes and bands of Indians including the Yakima Tribe and collectively referred to in the treaty as the "Yakima Nation of Indians." This treaty was ratified by the United States Senate on March 8, 1859, and was proclaimed by the President of the United States on April 18, 1859. (12 Stat. 951–956.) It is referred to in the record as the Yakima Treaty of *1855*.

By article I of this treaty, the Indians ceded and conveyed to the United States a vast tract of land described by metes and bounds and consisting of all of the lands which they had been using and occupying from time immemorial. By Article II, however, part of this tract, also described by metes and bounds, was reserved "for the use and occupation of" the Indians. Article X provided for the reservation in a designated area of a second tract not exceeding six square miles to be surveyed and marked out under the President's direction. In net totals, the Indians ceded and conveyed to the United States some 16,920 square miles of land and reserved 1,233 square miles. (See, in defendant's Exhibits 1 or 2, letter of June 14, 1855, from

Governor Stevens to Commissioner of Indian Affairs forwarding treaty of 1855.)

Of the remaining provisions in the treaty only those in the second paragraph of Article III need be referred to here, viz:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

NATURE OF PROCEEDINGS AND RULINGS BELOW

The information originally filed against appellant charged that he had caught salmon at Spearfish, in Klickitat County, with a dip bag net on May 16, 1939, and had "then and there" sold "the same commercially, without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington" (R. T. p. 2). On his arrest, the United States, acting on his behalf as one of its Indian wards, petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Washington, Southern Divi-

sion. (See Appendix, Ex. B, *infra.*) The state demurred. (See Appendix, Ex. C, *infra*), and the court, after hearing oral argument, dismissed the petition..

Although the court filed no opinion, the petition for the writ and the "findings" recited in the order of dismissal (See Appendix, Ex. D, *infra*), reveal that the questions raised, argued, and decided on the demurrer specifically involved the validity of Section 5703 on the ground of its repugnancy to the Yakima Treaty of 1855 and to the Constitution of the United States.

An appeal was taken to the Circuit Court of Appeals, Ninth Circuit, where, "notwithstanding the desire of both parties for a decision on the merits" (*United States* v. *House,* 110 F. 2d 797, 799), the Court declined to pass on the questions which had been presented as to the validity of Section 5703 if its license requirements were held applicable to the fishing for which Tulee was being prosecuted. The Circuit Court of Appeals considered it improper for federal courts to exercise their jurisdiction on *habeas corpus* to determine the validity of a state statute under a particular interpretation of its provisions before the interpretation had actually been made and applied to the appellant and before he had exhausted the remedies open to him in the state courts. On this narrow ground, the denial of the writ was affirmed. (See Appendix, Ex. E, *infra.*)

The state thereupon amended its information in the Superior Court so that it would show on its face that Tulee was "a member of the Yakima Indian Tribe" and that he had caught salmon "at Spearfish on the Columbia River * * * one of the usual and accustomed ancient fishing places of said Yakima Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 Stat. 951), and off the Reservation of said Indians, * * * and did then and there sell the same commercially without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington" (R. T. p. 4). Tulee demurred on the grounds that the facts charged did not constitute a crime and that the information contained matter which, if true, constituted a legal bar to the action (R. T. p. 6). The demurrer was overruled. (R. T. p. 8), and the case went to trial in the state Superior Court before Judge Stone and a jury.

At the close of the evidence, Judge Stone gave the jury the following instruction, among others, at the request of the state (R. T. p. 18 and S. of F. p. 18):

INSTRUCTION NO. 4

> You are instructed that under the laws of the state of Washington the state has a right to regulate the taking of fish within its boundaries and on streams not included in or bordering upon the Yakima Indian Res-

ervation; and that the defendant, Sampson Tulee, is as much subject to this right of state regulation as if he were not a member of the Yakima tribe when he is fishing on any stream not within or bordering upon said Indian Reservation.

Judge Stone also refused to give the following instructions requested on behalf of Tulee (R. T. p. 15):

INSTRUCTION NO. 1

You are instructed to return a verdict in this case finding the defendant Not Guilty.

INSTRUCTION NO. 2

You are instructed that the Yakima Indian Treaty of June 9, 1855, contains the following provision:

"The exclusive right of taking fish in all the streams, where running thru or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with the citizens of the Territory, and of erecting temporary buildings for curing them; * * *"

And that by this treaty provision there was secured to and vested in the members of said Yakima Tribe of Indians a perpetual right of fishing in their usual and accustomed places off the Yakima Indian Reservation without interference in the exercise

of said right by the State of Washington, and that the State of Washington has no right to compel such Indian fishermen to obtain licenses from said state to fish at these usual and accustomed places.

And you are, therefore, further instructed that even though you should find from the evidence, beyond all reasonable doubt, that the defendant, Sampson Tulee, at the time and place alleged in the amended information did catch certain food fish, to wit, Salmon, and did sell the same commercially, without first having obtained a license for the taking thereof as required by section 5703 of Remington's Revised Statutes of Washington, you should, nevertheless, return a verdict of not guilty if you also find from the evidence that the defendant was, at said time, a member of the Yakima tribe of Indians and that the said place mentioned in the amended information was a usual and accustomed fishing place of the said Yakima tribe of Indians, as defined in said Yakima Indian treaty.

Not content with noting a bare exception to the court's rulings on the requests for instructions, one of the counsel for Tulee spread the following statement upon the face of the record (R. S. of F. p. 22):

Mr. SIMMONS. If the Court please, the Jury having withdrawn, the defendant Sampson Tulee, now objects to the Court giving Instruction No. 4 for the following reasons:

1. There is no jurisdiction in this Court nor in the State of Washington over the fishing activities of the Yakima Indians and, in particular, over this defendant, Sampson Tulee, a member of the Yakima tribe of Indians when fishing at Spearfish, the usual and accustomed fishing place as defined by the Yakima Treaty of June 9, 1855 (12 Stat. 951).

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and of erecting temporary buildings for curing them."

2. *That said Statute, namely, Section 5703, Remington's Revised Statutes of the State of Washington, upon which said amended information is based, is unconstitutional and void insofar as it attempts to regulate, control, or restrict fishing at Spearfish, Washington, the location set forth in the amended complaint on file herein by the defendant, Sampson Tulee, a member of the Yakima tribe of Indians.*

3. *By paragraph 2 of Article III of the Treaty of June 9, 1855 (12 Stat. 951), there is allotted to members of the Yakima tribe of Indians and to this defendant, Sampson Tulee as a member of the Yakima Tribe of Indians, the perpetual right to take fish in*

all the streams bordering upon or running through said Reservation as well as at all usual and accustomed places, including Spearfish, Washington, without interference by the State of Washington, or otherwise. [Italics ours.]

4. The fishing activities of the Yakima Indians at their usual and accustomed fishing places as defined by the treaty of June 9, 1855, which would include Spearfish, Washington, the location named in the amended information on file herein, are exclusively under Federal jurisdiction and not the jurisdiction of the State of Washington.

Defendant excepts to the failure of the Court to give Defendant's proposed instruction No. 1 for the reason that it affirmatively appears from the evidence of the plaintiff, state of Washington, that Sampson Tulee caught and sold salmon at Spearfish, Washington, which was the usual and accustomed fishing place on the Columbia River of the Yakima tribe of Indians as defined in the Yakima Indian treaty of June 9, 1855; that Sampson Tulee was not subject in fishing at said place to the regulatory laws of the State of Washington, and the verdict, therefore, should have been directed in favor of the defendant.

2. The defendant excepts to the failure of the Court to give defendant's proposed Instruction No. 2 for the identical reasons given and set forth in support of the defendant's exception to the giving by the Court of its Instruction No. 4.

The jury returned a verdict of "Guilty" (R. T. p. 21) and Judge Stone sentenced Tulee to a fine of $25 and costs (R. T. p. 22). Thereafter, a motion was made on Tulee's behalf for a new trial (R. T. p. 23) and was denied by the court (R. T. p. 24); and after entry of formal judgment and sentence (R. T. p. 22), an appeal was duly taken to the Supreme Court of the State of Washington (R. T. p. 25). The assignments of error filed on appellant's behalf specifically and separately covered each of the rulings which had been made against him in the Superior Court including those with respect to the granting of the state's request for Instruction No. 4 and the refusal to give Instructions Nos. 1 and 2 requested by appellant (R. Ap's Brief p. 8). The state Supreme Court, by a 5 to 3 decision, affirmed appellant's conviction (R. T. pp. 29–50). The majority and minority opinions also are printed in the appendix hereto. (See pp. i–xvi.)

REASONS AND CASES BELIEVED TO SUSTAIN JURISDICTION ON APPEAL

The record as a whole makes perfectly clear that the only genuine controversy throughout all the proceedings in the case at bar concerned the fundamental question whether Section 5703 of the Washington Revised Statutes is invalid on the ground of repugnancy to the Yakima Treaty of 1855 and to the Constitution of the United States if and to the extent that it is construed and

applied to have required appellant to obtain permission from and pay a license fee to the State of Washington if he wished, without thereby subjecting himself to criminal punishment at the hands of the state, to exercise the right which he admittedly had under that treaty to catch salmon at Spearfish, Washington. The present prosecution actually was instituted against Tulee by prearrangement between the state Attorney General, the United States Attorney for the Eastern District of Washington and the District Counsel for the United States Department of the Interior for the very purpose of settling this question (see *United States* v. *House*, 100 F. 2d 797, 801); and, we submit, a sufficient foundation has been laid in the record for the achievement of that purpose through the present appeal. The statement of Tulee's objections to the trial court's instructions and rulings on the requests for instructions to the jury was intended to and did show of record that his objections involved an attack upon the validity of Section 5703, insofar as it was being applied to the exercise of his fishing rights under the treaty of 1855, and not merely a claim of right or immunity under the treaty and the Constitution. Since these rulings were subsequently assigned as error on the appeal to the Supreme Court of the State of Washington, and urged as a basis for reversing the conviction, it is established of record that the validity of the state

statute was drawn in question before the highest court of the state on the ground of its being repugnant to a treaty and to the Constitution of the United States; and since the state Supreme Court affirmed the judgment convicting and sentencing Tulee for a violation of the state statute, its decision necessarily was in favor of the validity of the state statute. Consequently, a sufficient basis exists for an appeal as of right to the Supreme Court of the United States.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Ward & Gow v. *Krinsky*, 259 U. S. 503;
Cudahy Packing Co. v. *Parramore*, 263 U. S. 418;
Asakura v. *City of Seattle*, 265 U. S. 332;
Fiske v. *Kansas*, 274 U. S. 380;
Ohio ex rel. Clarke v. *Deckenbach*, 274 U. S. 392;
Doty v. *Love*, 295 U. S. 64;
James Stewart & Co. v. *Sadrakula*, 60 Sup. Ct. 431.

The majority opinion filed in the state Supreme Court refers expressly to the errors assigned by appellant "upon certain instructions given by the court, and upon the refusal of the trial court to give two instructions which appellant requested," but nowhere mentions *in haec verba* the issue as to the validity of Section 5703. That this was not due to any failure on appellant's part to press the issue on the appeal before that court is indicated

by the following quotation of the opening paragraphs in the brief filed therein on appellant's behalf (pp. 1–2):

QUESTIONS PRESENTED

1. Whether the Yakima Treaty of June 9, 1855, secures and vests in the defendant, as a member of the Yakima Tribe of Indians, and members of the Yakima Tribe of Indians, a perpetual right of fishing at their usual and accustomed places off the Yakima Indian Reservation, which is protected under the 14th Amendment to the Constitution of the United States, without interference in the exercise of this right in any manner, by regulation or otherwise by the State of Washington. The trial court ruled in the negative.

2. Whether the Statute, Section 5703 Remington's Revised Statutes of the State of Washington is void because it violated Paragraph 2 of Article 3 of the Yakima Treaty of June 9, 1855, which provides in part:

"The exclusive right of taking in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory, and of erecting temporary buildings for curing them * * *".

in that the enforcement of such Statute violates the rights of the defendant under the Treaty of June 9, 1855, and under the Constitution of the United States of America. The trial court ruled in the negative.

In any event, even a complete failure on the part of the state Supreme Court to mention in its *opinion* the issue thus specifically called to its attention, could not and would not have prejudiced appellant's right to appeal from its final *decision* and *judgment* which, by affirming appellant's conviction for a violation of the state statute, necessarily upheld the validity of that statute in the face of the attack which appellant had levelled against it.

Dorchy v. *Kansas*, 272 U. S. 306, 309;
Cf. Erie Railroad Co. v. *Purdy*, 185 U. S. 148, 154.

SUBSTANTIAL NATURE OF QUESTIONS INVOLVED

I. Section 5703, as construed and applied to appellant by the highest court of the State of Washington, is invalid on the ground of repugnancy to a treaty of the United States

It needs no argument to establish that the United States has power, under the Constitution, to enter into treaties with the Indian tribes and that the Yakima Indian Treaty of 1855, on its ratification by the Senate and its approval and promulgation by the President on April 18, 1859, attained the

same status as a treaty entered into between the United States and a foreign nation. (*Worcester* v. *Georgia*, 6 Pet. 515; *Holden* v. *Joy*, 17 Wall. 211; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Winans*, 198 U. S. 371.) As is true with respect to any treaty validly entered into by the United States, every provision appropriately included in that treaty became part of the supreme law of the land with the same force and effect as if contained in a law validly enacted by the Congress. (U. S. Const., Art. VI, cl. 2; *Worcester* v. *Georgia*, *supra*; *Holden* v. *Joy*, *supra*; *United States* v. *Forty-Three Gallons of Whiskey*, supra; *Havenstein* v. *Lynham*, 100 U. S. 483; *United States* v. *Kagama*, 118 U. S. 375; *Geofroy* v. *Riggs*, 133 U. S. 258; *United States* v. *Thomas*, 151 U. S. 577; *Asakura* v. *City of Seattle*, 265 U. S. 332.) As such, it could and may have been abrogated, superseded, or modified in whole or in part by a later treaty or act of Congress; and since the provisions in a treaty, unlike those in the Constitution, do not enjoy a higher status than an act of Congress, the Congress also has power to enact laws which violate existing treaties or which abridge or deny the enjoyment of rights or privileges conferred under them. (*The Cherokee Tobacco*, 11 Wall. 616; *Beecher* v. *Wetherby*, 95 U. S. 517; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.)

The same is not true, however, with respect to the state legislatures, which are just as bound by the provisions in a federal treaty as by those in a validly enacted federal statute or in the federal Constitution itself. Consequently, a right or privilege granted under a provision appropriately incorporated into a treaty of the United States is no more subject to violation or impairment by the states than a right or privilege enjoyed under the Constitution or under a validly enacted law of the United States; and it makes no difference whether the treaty preceded or succeeded the admission of the state into the Union or whether or not the subject matter is one which, except for the treaty, would be one normally or even exclusively subject to the regulatory or other powers of the state. (*Georgia* v. *Brailsford*, 3 Dall. 1; *Ware* v. *Hylton*; 3 Dall. 199, 236; *Clerke* v. *Harwood*, 3 Dall. 342; *Hopkirk* v. *Bell*, 3 Cranch 454; *Chirac* v. *Chirac*, 2 Wheat. 259; *Orr* v. *Hodgson*, 4 Wheat. 453; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464; *Hughes* v. *Edwards*, 9 Wheat 489; *Carneal* v. *Banks*, 10 Wheat. 181; *United States* v. *Forty-Three Gallons of Whiskey, supra; Havenstein* v. *Lynham, supra; Geofroy* v. *Riggs, supra; Blythe* v. *Hinckley*, 180 U. S. 333, 340; *Dick* v. *United States*, 208 U. S. 340; *Johnson* v. *Gearlds*, 234 U. S. 422; *Missouri* v. *Holland*, 252 U. S. 416; *Asakura* v. *City of Seattle, supra; Nielson* v. *Johnson*, 279 U. S. 47.)

The validity of the foregoing well settled principles has not been disputed in the case at bar. There has however been a complete failure to perceive the necessity for applying them due to a misunderstanding as to the nature of the question presented for decision. The state Supreme Court disposed of the case at bar as if it turned on the broad question as to the power of the State of Washington to regulate the fishing activities of the Yakima Indians in the interest of conservation. The court distinguished between fishing by the Indians at places inside or bordering on the reservation and fishing at places outside and away from the reservation. Conceding that the former was not validly subject to state regulation, the court took an opposite view with respect to the latter and on the basis of that general conclusion affirmed appellant's conviction. Thus, the majority opinion states (Appendix, Ex. A, *infra*, R. Tr. p. 30):

> The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia river, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the State of Washington covering the taking of food fish from the lakes and rivers within this State.
>
> * * * * *
>
> We are not here concerned with the right of the Indians to take fish from the streams

running through or bordering upon the reservation. We are concerned only with the latter portion of the paragraph of the treaty quoted, which secured to the Indians the right to fish "at all usual and accustomed places, in common with citizens of the Territory."

* * * * *

This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, held that the State had no jurisdiction over the Indians, insofar as their right to fish in streams flowing through or bordering upon the Yakima reservation was secured to them by the treaty above referred to.

* * * * *

The minutes of the council between Governor Stevens and the Indians, at which council the treaty was made and executed, constitute a most interesting historical record, and show, as argued by appellant, that Governor Stevens, doubtless in the exercise of the utmost good faith, assured the Indians that the Federal government would faithfully carry out all terms and conditions of the treaty. To this day, the vast domain set apart to the tribe, comprising many acres of rich land, is enjoyed by the members of the Yakima tribe. Under the authorities, however, it must be held that as to the right of the Indians to fish at points without the reservation, which right was secured to them by the treaty "in common with citizens of the territory," such right has been limited by the statutes of the state of Washington govern-

> ing the taking of fish and wild game, and that the decisions of this court hereinabove referred to correctly declared the law, and should be followed in the case at bar.

We submit that the court mistook the question actually presented for decision. The real issue was not whether the state had a general right to regulate in the interest of conservation but whether the particular regulation embodied in Section 5703 could be held applicable to fishing by the Indians at their usual and accustomed places outside of the reservation without thereby impairing the fishing rights "secured to" them under their treaty with the United States. It requires little more than a comparison of the statutory and treaty provisions to perceive the conflict between them if the statute is applied to the exercise of the right guaranteed under the treaty. Under Section 5703, persons desiring to catch fish in the State of Washington are required to obtain special permission in the form of a State license and to pay specified fees to the State for the privilege. The treaty provides:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; * * *

If the foregoing provision means a thing at all, it means that the Indians obtained a right to fish at their "usual and accustomed places" without need of further permission and without need of further payments in addition to the very substantial consideration furnished by them under the treaty itself. The appropriateness of the inclusion of this provision in the treaty has already been established by decision of the Supreme Court of the United States. Speaking with respect to this very provision in this very treaty, that court, in *United States* v. *Winans*, 198 U. S. 371, 383, declared:

> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The sentence referring to the absence of unreasonable restrain upon the state "in the regulation of the right" was a pure *dictum* since no question affecting the regulatory power of the state was at all involved in the case. In any event, it seems

obvious in the case at bar that regardless of what regulatory powers either the United States or the state might conceivably have, those powers could not and would not permit the particular "regulation" contained in Section 5703. That regulation, as interpreted and applied by the state Supreme Court, was, we submit, clearly repugnant to the treaty and therefore invalid.

II. Section 5703, as it has been interpreted and applied to appellant, is repugnant to the federal Constitution because it attempts to regulate a subject matter under the special protection and within the exclusive jurisdiction of the federal government

Under Point I, *supra*, we sought to point out that the very nature of the fishing rights secured to the Indians under the treaty necessarily were inconsistent with and hence precluded the particular "regulations" embodied in Section 5703, even if it were to be assumed that the state has general regulatory power over the fishing activities of the Yakima Indians at places outside of their present reservation. Under Point II, we seek to establish that even if Section 5703 imposed requirements not themselves necessarily repugnant to the rights reserved and guaranteed under the treaty, it would still be invalid as an attempt by the state to regulate a subject matter under the special protection and exclusive jurisdiction of the federal government.

The treaty was entered into between the United States and the Indians at a time when the State

of Washington was not yet in existence. Assuming that there was power to regulate at all (see *United States* v. *Cutler*, 37 F. Supp. 724), that power could have resided only in the federal government. The treaty does not purport to confer any power on the territorial government which it did not already have under existing law; and it is clear that under existing law it had no regulatory power whatsoever over the Indians. On the contrary, its Organic Act (Act of March 2, 1853, c. 90, sec. 1, 10 Stat. 172, 173) provides:

> That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed: * * *

In support of the claim that the treaty nevertheless affirmatively conferred power on the Territory, rather than on the United States, to regulate fishing by the Indians at their "usual and accustomed places" outside of the reservation, the state has contended that at such places, unlike those inside or on the borders of the reservation, the right to fish was secured to the Indians only "in common with citizens of the Territory" and that since fishing by such citizens was subject to regu-

lation by the Territory, fishing by the Indians also became subject to such regulation.

This contention is demonstrably fallacious and has already been rejected by the Supreme Court of the United States in *United States* v. *Winans, supra.* The question there presented and the decision rendered with respect to it are indicated in the following quotations from the court's opinion (198 U. S. 371, 377, 379, 380, 381, 382, 383):

> This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights and privileges on the Columbia River in that State, claimed under the provisions of the treaty between the United States and the Indians, * * *
>
> * * * * *
>
> The respondents or their predecessors in title claim under patents of the United States the lands bordering on the Columbia River and under grants from the State of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the State to maintain devices for taking fish, called fish wheels.
>
> At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occu-

pancy to certain lands and to definite rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. * * *

* * * * *

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice

which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory."

As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

* * * * * *

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

> The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced opposing the dicta scattered through the cases, which seemed to assert a contrary view.

See, in accord, *Seufort Bros.* v. *United States*, 249 U. S. 194.

The state has not contended that the treaty should be considered as having been entered into for the benefit of the non-Indian citizens of the Territory and conferred on them the same right and entitled them to the same relief that was granted the Indians in the *Winans* case. And in the light of the decision in that case, we submit that it is improper to say that the phrase "in common with citizens of the territory" modifies the word "right". What it really modifies are the words "taking fish"; and the most that can be inferred from its inclusion in the treaty is that the Indians were giving up the right to exclude the whites from fishing on the tracts being conveyed by them to the United States, not that they were sharing their rights with the whites on the same or

equal terms. Therefore it does not follow that because fishing by the whites was subject to regulation by the Territory, fishing by the Indians also was subject to such regulation. *Fishing by the Indians, being secured to them under a treaty of the United States, was under the special protection of the United States and hence subject to regulation, if at all, only by the Congress of the United States. Fishing by the citizens of the Territory was neither secured by a treaty nor under the special protection of the United States, and was therefore freely subject to regulation by the Territory.*

This basic situation was not changed by the admission of the State of Washington into the Union except insofar as the state succeeded to the regulatory power of the Territory over non-Indian fishing activities. So far as concerned Indian fishing activities, the treaty continued in existence and the Indians continued to enjoy the same special protection of the United States under its provisions. (See *United States* v. *Winans*, 198 U. S. 371; *United States* v. *Sutton*, 215 U. S. 291; *United States* v. *Pelican*, 232 U. S. 442; *Johnson* v. *Gearlds*, 234 U. S. 422; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194.) Such a protective relationship, it has consistently been held by the Supreme Court of the United States, suffices in and of itself to place the property, activity, or other subject matter enjoying the special protection, un-

der the *exclusive* jurisdiction of the United States. (*Worcester* v. *Georgia*, 6 Peters 515; *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Thomas*, 151 U. S. 577; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Sutton*, 215 U. S. 291; *Clairmont* v. *United States*, 225 U. S. 551; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Pelican*, 232 U. S. 442; *Perrin* v. *United States*, 232 U. S. 478; *Johnson* v. *Gearlds*, 234 U. S. 422; *United States* v. *Nice*, 241 U. S. 591; *Blanset* v. *Cardin, as Guardian*, 256 U. S. 319; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488; *United States* v. *McGowan*, 302 U. S. 535.)

Exclusive jurisdiction does not depend on the place where the property is located or the activity carried on. It exists as to the particular property, activity, or other subject matter under federal protection even though no Indian reservation is involved and even though the place and subject matter would have been subject to state power and law except for the federal protective interest therein, evidenced through the treaties or laws of the United States. (*The Kansas Indians, supra; United States* v. *Forty-Three Gallons of Whiskey, supra; United States* v. *Thomas, supra; United States* v. *Rickert*, 188 U. S. 432; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United*

States v. *Pelican, supra; Perrin* v. *United States, supra; Johnson* v. *Gearlds, supra; United States* v. *Nice, supra; Blanset* v. *Cardin, supra; Sperry Oil & Gas Co.* v. *Chisholm, supra; United States* v. *McGowan, supra.*) A similar situation exists even where Indian reservations are involved, but where they are located on territory wholly subject to state jurisdiction except with respect to Indian property and activities carried on there under federal protection. (*United States* v. *McBratney,* 104 U. S. 621; *United States* v. *Kagama, supra; Draper* v. *United States,* 164 U. S. 240; *United States* v. *Celestine, supra; United States* v. *Sutton, supra; Hallowell* v. *United States,* 221 U. S. 317; *United States* v. *Pelican, supra; United States* v. *McGowan, supra.*)

In the case at bar, the state Supreme Court has conceded the absence of state jurisdiction over the fishing activities of the Indians at the fishing places which, though actually outside of the reservation, happen to be located in streams contiguous to its boundaries. We submit that it is equally true with respect to the usual and accustomed places outside the reservation and not contiguous to its boundaries. The protective interest of the United States evidenced in and by the Yakima Treaty of 1855, extends to the fishing activities of the Indians at all these places; and these activities, in accordance with the rule established and applied in the cases just cited,

are therefore under the *exclusive* jurisdiction of the United States. If, as may be conceded, power to regulate them exists at all, it can be exercised only by the Congress and not by the Legislature of the State of Washington.

The decisions in *Ward* v. *Race Horse,* 163 U. S. 504, and *People ex rel. Kennedy* v. *Becker,* 241 U. S. 556, do not militate against the foregoing conclusion. The *Race Horse* case turned on the specially limited nature of a provision in a treaty between the United States and the Bannock tribe of Indians which gave them "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." Race Horse, a Bannock Indian, was being prosecuted for an alleged violation of a Wyoming statute committed when he killed elk on unoccupied land belonging to the United States but situated within the boundaries of the state. The Supreme Court upheld the conviction; but it did not do so on the ground that the state had the power to regulate hunting by the Indians even though this was an activity with respect to which the United States was exercising a protective interest, as evidenced by the federal treaty. On the contrary, the court seems to have assumed as a matter of course that hunting by the Indians pursuant to the right provided for in the treaty would

not have been subject to state regulation. At any rate, it certainly neither assumed nor held to the contrary. Relying solely on the limited nature of the right conferred under the particular treaty in question, the court held that it was a right which was intended to be exercised not on all unoccupied lands belonging to the United States, but only on such of them as were not situated inside the borders of any state of the Union. It therefore was a right which necessarily ceased to exist with respect to the unoccupied lands in the Territory of Wyoming as soon as the State of Wyoming was admitted to the Union. Thus, Race Horse was not being prosecuted for an exercise of his hunting rights under the Bannock treaty. The conduct for which the state was seeking to punish him was not covered by the treaty and did not constitute an activity in which the United States was exercising a special protective interest. The essential basis for exclusive federal jurisdiction, therefore, was wholly absent from the case. The narrow limits of the decision are illustrated by the following quotations from the opinion (163 U. S. 504, 507–510, 515–516):

> It may at once be conceded that the words "unoccupied lands of the United States" if they stood alone, and were detached from the other provisions of the treaty on the same subject, would convey the meaning of lands owned by the United States, and

the title to or occupancy of which had not been disposed of. But in interpreting these words in the treaty, they cannot be considered alone, but must be construed with reference to the context in which they are found. Adopting this elementary method, it becomes at once clear that the unoccupied lands contemplated were not all such lands of the United States wherever situated, but were only lands of that character embraced within what the treaty denominates as hunting districts. * * *

To suppose that the words of the treaty intended to give to the Indian the right to enter into already established States and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. * * * It is undoubted that the place in the State of Wyoming, where the game in question was killed, was at the time of the treaty, in 1868, embraced within the hunting districts therein referred to. But this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts and came within the authority and jurisdiction of a State. The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. * * *

> Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. * * *

The only bearing which the *Race Horse* decision could have had on the case at bar would, at best, have been limited to the question whether the interpretation there adopted with respect to the treaty provision there involved should be followed in interpreting the treaty provision involved here. As has been seen, this precise question was actually presented for determination in *United States* v. *Winans,* 198 U. S. 371, and the decision in that case, subsequently reaffirmed in *Seufert Bros. Co.* v. *United States,* 249 U. S. 194, definitely established that the admission of the State of Washington into the Union neither abrogated the Yakima Treaty of

1855 nor curtailed the right reserved in the treaty to fish at all their usual and accustomed places outside as well as inside their present reservation. It is true that the opinion in the *Winans* case contains a lone sentence which probably, though not necessarily, was intended to imply the existence of some unspecified state power to regulate the exercise of this right by the Indians. But the question of regulation was in no wise involved in the case. This *dictum* did not change the effect of the court's decision on the real question presented; it cannot reasonably preclude the application of that decision in the case at bar to the extent that the same question is presented here; and it also cannot be regarded as having so conclusively settled the question of state regulatory power not at all presented there, as to preclude its consideration on the merits to the extent that it is presented here.

In *People ex rel. Kennedy* v. *Becker, supra,* the Seneca Nation of Indians in 1797 conveyed certain land in the State of New York to Robert Morris by a grant which reserved "to them * * * and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Under an act of Congress in force at the time, it was unlawful for any white person to purchase land from the Indians unless the transaction was approved and ratified through a formal treaty with the United States. It was for this reason that this purely private transaction was

approved and ratified by a treaty with the United States. No land was conveyed to the United States by the Indians under the treaty; nor were any rights guaranteed or secured to the Indians by the United States. All the United States purported to do and did do was to determine that the particular transaction between the Seneca Indians and Robert Morris was not inimicable to their interests and could therefore be given legal effect. The function performed by the United States under this treaty was no different than the function now performed by the Secretary of the Interior whose approval is required before certain types of contracts entered into by the Indians can become effective. Once the approval is granted, the governmental purpose is fully achieved and the governmental interest and function in the transaction ceases. (*In re Sanborn*, 148 U. S. 222, 227; *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.)

This is very different from the situation involved in the case at bar in which the Indians conveyed their land directly to the United States and in which the United States itself undertook a continuing obligation to secure to the Indians the fishing rights reserved for them under the treaty. In the *Becker* case, no such basis existed for establishing that the State of New York was powerless to regulate the fishing by the Indians on the lands conveyed to Robert Morris because the subject matter was under the protective interest and exclusive jurisdiction of the United States; and no

such suggestion was even made on behalf of the Indians. The contention of the Seneca Nation was that by virtue of its agreement with Robert Morris the Seneca Nation had reserved for itself exclusive power to regulate the exercise by its members of the fishing rights reserved under the grant. The opinion in the *Becker* case took special pains to point out the limited nature of this contention; and in deciding against its validity, the court certainly did not foreclose the very different question involved in the case at bar, i. e., the question as to the exclusive jurisdiction, not of the Yakima Nation of Indians, but of the United States, by reason, not of its mere stamp of approval on a conveyance by the Indians to a private person, but of its own participation in the Treaty of 1855 as the contracting party to whom the conveyance was being made and by whom the assurances of continued enjoyment of the reserved fishing rights were being given, and by reason of its consequent continuing protective interest in the exercise and enjoyment of those rights by the Indians.

We submit, therefore, that the state Supreme Court was not justified in the reliance which it placed on the decisions in the *Race Horse* and *Becker* cases.

In conclusion, we invite attention to the fact that subsequent to the decision of the state Supreme Court in the case at bar, the United States District Courts for the Eastern and for the Western Districts of Washington have held, in two cases in-

volving treaty provisions similar to the one in the Yakima Treaty of 1855, that the State of Washington has no power whatsoever to regulate, tax, or interfere in any way with the fishing activities of those Indians pursuant to those treaties at places outside of their reservations. (*Makah Indian Tribe et al.* v. *McCauley, et al.*, Appendix Ex. F, *infra; Quileute Indian Tribe* v. *B. F. McCauley, et al.*, No. 72, Civil, U. S. D. Ct., E. D. Wash., injunction against state officers granted May 5, 1941.)

IMPORTANCE OF CASE

The attempt of the State of Washington to regulate the fishing rights reserved and guaranteed to the Indians of the Yakima Reservation has created a decidedly serious situation. The Indians have such a deep-seated conviction that they have the right to fish under their treaties at usual and accustomed places without state interference that they have threatened to refuse *en masse* to comply with state laws and regulations. It is certain that they will not be satisfied nor will the controversy ever satisfactorily be settled until it is decided by the Supreme Court of the United States. The gravity of the situation led to numerous conferences between representatives of the United States Departments of Justice and the Interior, and of the State of Washington, with the result that the present prosecution was commenced against Sampson Tulee. On the basis of assurances from the United States Attorney for the Eastern District

of Washington that every effort would be made to bring the case speedily to the Supreme Court of the United States, the state officers have held in abeyance prosecutions against large numbers of other Indians who have refused voluntary compliance with the state licensing laws. (See *United States* v. *House,* 100 F. 2d, 797, 801.)

The outcome of the present controversy is of immediate and vital concern not only to some three thousand members of the Yakima Tribe but also to many thousands of Indians in other tribes, particularly the fish-eating tribes of the Northwest, whose treaty fishing rights constitute the very backbone of their tribal economy. (See Article 3, Treaty of December 26, 1854, with Nisqualli, Puyallup, etc., 10 Stat. 1132; Article 5, Treaty of January 22, 1855, with Dwamish, Suquamish, etc., 12 Stat. 927; Article 4, Treaty of January 26, 1955, with S'Klallam, 12 Stat. 933; Article 4, Treaty of January 31, 1855, with Makah, 12 Stat. 989; Article 1, Treaty of June 9, 1855, with Walla Walla, Cayuse, etc., 12 Stat. 945; Article 3, Treaty of June 11, 1855, with Nez Perces, 12 Stat. 157; Article 1, Treaty of June 25, 1855, with Tribes of Middle Oregon, 12 Stat. 963; Article 3, Treaty of July 1, 1855–January 25, 1856, with Quinaielt, etc., 12 Stat. 971; Article 3, Treaty of July 16, 1855, with Flatheads, etc., 12 Stat. 975.)

Suits to enjoin State officers from interfering with the free exercise of the rights under four of the foregoing treaties actually are now pending in the United States courts, and in two of them

injunctions have recently been granted on the basis of sweeping decisions in favor of the Indians (see Appendix, Ex. F, *infra*). These decisions are in conflict not only with State court decisions but also with the decision against the appellant in the case at bar on the *habeas corpus* proceedings in the United States District Court for the Eastern District of Washington. (See Appendix, Ex. D, *infra*.)

In the light of this situation and of the substantial nature of the questions presented on this appeal, it is respectfully submitted that if for any reason the Supreme Court of the United States should conclude that it lacks jurisdiction to review the final judgment of the State Supreme Court by appeal, the court should consent to undertake such a review as if on *certiorari* in accordance with section 237 (c) of the Judicial Code (U. S. C. 344 (c).)

Dated, June 30, 1941.

Respectfully submitted.

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APPENDIX

EXHIBIT A

MAJORITY AND DISSENTING OPINIONS FILED ON THE APPEAL TO THE HIGHEST STATE COURT

In the Supreme Court, of the State of Washington, *State of Washington, Respondent* v. *Sampson Tulee, Appellant.*

No. 28079 En Banc Filed January 13th, 1941

Defendant herein, Sampson Tulee, a member of the Yakima tribe of Indians, was charged by information filed in the superior court for Klickitat county, Washington, with the offense of having, May 6, 1939, caught salmon and food fish with a dip bag net, and with selling commercially the fish which he had caught, all without first having obtained a license to fish, as required by Rem. Rev. Stat. (Sup.), Sec. 5703. Tulee claiming that under the treaty of June 9, 1855 (12 U. S. Stat. 931), he, as a member of the Yakima tribe of Indians, had the right to catch fish as he did, the United States, on behalf of its ward, Sampson Tulee, the defendant, petitioned the United States district court for the eastern district of Washington for a writ of habeas corpus. After due proceedings had, the United States district court held that the right secured to the Yakima tribe of Indians by the treaty

referred to was subject to the paramount and superior right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of salmon from the waters within its jurisdiction, and denied the petition for the writ. On appeal to the United States circuit court, that court held that while it had jurisdiction of the case, it was not a proper cause for the exercise of such jurisdiction, and, following the rule laid down in the case of *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, held that the cause should be tried in the state courts, subject to review of any judgment of this court before the supreme court of the United States.

The cause then proceeded before the superior court for Klickitat county on an amended information charging defendant with having caught, at one of the usual and accustomed ancient fishing places of the Yakima tribe of Indians, as defined in the treaty above referred to, certain food fish and salmon, and selling the same commercially without having obtained a license for the taking thereof, as required by the state law. On arraignment defendant entered a plea of not guilty, and demurred to the information on the grounds that the facts charged do not constitute a crime, and that the information contained matter which, if true, constitutes a legal bar to the action. The demurrer was overruled by the trial court, and the action proceeded to trial before the court and jury. Defendant objected to the introduction of any testimony, and moved for a directed verdict of not guilty, his objection and motion having been overruled. The jury returned a verdict of guilty, whereupon defendant moved in arrest of judgment and for a new

trial. These motions having been denied, judgment was entered upon the verdict, and sentence imposed. Defendant was admitted to bail, and appeals to this court from the judgment of guilty and sentence imposed thereon.

Error is assigned upon the overruling of appellant's demurrer to the amended information; upon the overruling of his objections to the introduction of any evidence; upon the denial of his motion for a directed verdict; and upon the denial of his motions in arrest of judgment or for a new trial. Appellant also assigns error upon certain instructions given by the court, and upon the refusal of the trial court to give two instructions which appellant requested.

The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia river, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the state of Washington covering the taking of food fish from the lakes and rivers within this state.

During the latter part of May and the first part of June, 1855, the United States, represented by Governor Isaac I. Stevens, who was governor of the then territory of Washington, and also the agent of the United States for dealing with the Indian tribes inhabiting the territory, held a council with the Yakima Indians and other tribes, at Walla-Walla valley, Washington Territory. As the result of this council, the treaty of June 9, 1855, between the United States and the Yakima tribe, was signed. By this treaty the territorial limits of the

reservation assigned to the Yakimas were fixed. The portion of the treaty pertinent to the facts in the case at bar is the second paragraph of article III, which reads as follows:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them * * *"

We are not here concerned with the right of the Indians to take fish from the streams running through or bordering upon the reservation. We are concerned only with the latter portion of the paragraph of the treaty quoted, which secured to the Indians the right to fish "at all usual and accustomed places, in common with citizens of the Territory."

All treaties with Indian tribes are construed by the courts in favor of the Indians, in an endeavor to exercise toward them the highest degree of good faith, because of the dominant position of the United States government. *United States* v. *Kagama,* 118 U. S. 375; *Choctaw Nation* v. *United States,* 119 U. S. 1; *Jones* v. *Meehan,* 175 U. S. 1; *United States* v. *Winans,* 198 U. S. 371.

At the time of the making of the treaty, the then territory of Washington was largely wild land, sparsely inhabited. The Yakimas were a powerful tribe, and the making of a treaty with them was an important step in the process of establishing orderly government and providing for the settlement of the territory. Fishing was an important part of

the life of the Indians, and the right secured to the tribe to catch fish not only on the reservation but at other accustomed fishing places off the reservation, was then to them a valuable right.

In connection with this treaty, appellant earnestly invites our attention to a certified copy of the minutes of the proceedings of the council above referred to, held between representatives of the United States and various bands of Indians, including the Yakima tribe, which resulted in the treaty of June 9, 1855. Governor Isaac I. Stevens, the senior representative of the United States present, as shown by the minutes of the council, repeatedly assured the Indians that they would not be wronged, that their treaty rights would be protected, and that the provisions of the treaty would be faithfully carried out. The minutes show that on June 5th, Governor Stevens assured the Indians that they would be allowed to go to the usual fishing places and fish in common with the whites.

In the early case of *Johnson* v. *McIntosh*, 21 U. S. 543, the court recognized the rights of the Indians, saying: "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy."

This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, in so far as their right to fish in streams flowing through or bordering upon the Yakima reservation was secured to them by the treaty above referred to.

In interpreting Indian treaties, the rule has been followed that rights not expressly granted by the

Indians are reserved to them. *Winters* v. *United States,* 207 U. S. 564.

On several different occasions this court has considered the question here presented. While admitting the force of our previous decisions, appellant asks that this question be re-examined, particularly in the light of the record of the council between Governor Stevens and the Indians above referred to; the existence of which record was not known at the time the prior cases were decided.

In the case of *State* v. *Towessnute,* 89 Wash. 476, 154, Pac. 805, it appeared that the defendant was charged with violation of the state game laws governing the taking of food fish. The defendant, a member of the Yakima tribe, had caught salmon at a point on the Yakima river several miles outside of the Yakima reservation. The defendant had not procured a fishing license, and had snagged the salmon with a gaff hook, thereby admittedly violating the state game law and rendering himself subject to prosecution, unless the clause of the treaty hereinabove quoted gave him the right to fish at the point on the Yakima river where he had taken the salmon, free from the limitations provided by the statutes of this state. The trial court sustained the defendant's demurrer to the information and dismissed the proceeding. On appeal this court reversed the trial court, holding that the information was good, and that the demurrer thereto was erroneously sustained.

In the case of *State* v. *Alexis,* 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041, the right of a member of the Lummi tribe of Indians under the treaty en-

tered into in 1859 between the United States and the Lummi tribe, to fish outside of the Lummi reservation, was considered. The treaty with the Lummis contained a provision similar to that contained in the treaty with the Yakimas. In the Superior court the defendant was convicted of violating the state statutes regulating the taking of fish, and on appeal the conviction was affirmed, this court, in a short per curiam opinion, stating that the same question was presented as that which the court had just decided in the Towessnute case, *supra*. On petition for rehearing, this court, in a supplemental per curiam opinion, referred to certain testimony introduced before the trial court, which is was contended showed some contemporaneous interpretation of the treaty in favor of the rights of the Indians to fish, and also showed some statements on the part of Governor Stevens referring to the rights of the Indians under the treaty. The court approved the original opinion in the case.

In *State* v. *Meninock;* 115 Wash. 528, 197 Pac. 641, it appeared that four members of the Yakima tribe had been charged with fishing in the Yakima river, in violation of the state fisheries code. The place where the defendants had taken fish was outside the Yakima reservation, but fell within the provision of the treaty with the Yakimas with which we are here concerned. The four cases were consolidated on appeal, and by a decision of this court sitting *en banc*, the judgments appealed from, by which the defendants were found guilty before the superior court, were affirmed.

In the case of *State* v. *Wallahee*, 143 Wash. 117, 255 Pac. 94, the defendant, a member of the Yakima

tribe, was charged with having in his possession, on a date specified, a dead female deer. It was admitted that the defendant killed the deer outside the boundaries of the Yakima reservation, while hunting upon open and unclaimed lands belonging to the United States. The treaty with the Yakimas reserved to the Indians the right to take game on any open and unclaimed government lands. The defendant was convicted before the superior court of violation of the game law, and on appeal the judgment was affirmed.

On behalf of the state of Washington, respondent herein, it is argued that Rem. Rev. Stat. (Sup.), Sec. 5703, providing for the issuance of licenses authorizing the licensee to fish within the waters of this state, is a lawful exercise of the police power of the state in regulating fishing within its borders. Respondent relies upon the proposition that the powers of the Federal government are limited to those granted to it either expressly or by implication in the constitution of the United States, all other powers being reserved to the states. This matter was discussed by the supreme court of the United States in the case of *Prigg* v. *Pennsylvania;* 41 U. S. 539, in which the court used the following language:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states and has never been conceded to the United States."

In the case of *Atlantic Coast Line R. Co.*, v. *Goldsboro*, 232 U. S. 548, is found the following:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

Upon admission to the union, a state assumes all the rights and powers the exercise of which is enjoyed by her sister commonwealths, each state, regardless of the date of its admission to the union, standing on a basis of equality with the other states. *Coyle* v. *Smith*, 221 U. S. 559.

In the case of *Ward* v. *Race Horse*, 163 U. S. 504 (cited in the case of *State* v. *Towessnute*, *supra*), the supreme court had before it for consideration a question very similar to that here presented. The case is of great interest, for the reason that it lays down principles applicable to several phases of the case at bar. It appeared that by the treaty of 1869 between the United States and the Bannock Indians, it was agreed that the Indians

> * * * shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Prior to the making of this treaty, Congress had established the territory of Wyoming, the act cre-

ating a territory providing that nothing therein contained should impair the treaty rights of the Indians as they then existed. In 1890, Wyoming was admitted to the union, and in 1895 the state legislature enacted a statute regulating the killing of wild game. Thereafter the defendant in the case, one Race Horse, a Bannock Indian, was charged with killing elk upon unoccupied land of the United States, in violation of the state statute. The defendant relied upon the treaty above referred to. The case went before the Supreme Court of the United States by way of a writ of habeas corpus. In the course of the opinion, in which it was held that the defendant could not avail himself of the provisions of the treaty between the United States and his tribe, the court stated:

> The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it were so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule * * *.
>
> The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the

State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding

> that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission.

The Race Horse case is strikingly like that here presented. The act of Congress of March 2, 1853 (10 U. S. Stat. 172), providing for the organization of the territory of Washington, contains a provision with respect to treaties with Indian tribes, similar to that contained in the act which organized the territory of Wyoming. In the Race Horse case, the Indian relied upon a provision of the treaty securing to the Indians the right to hunt upon the unoccupied lands of the United States, so long as peace subsisted. In the case at bar, the treaty with the Yakimas secured to them the right to hunt upon open and unclaimed lands belonging to the United States (*State* v. *Wallahee, supra*), in addition to the right to fish at their accustomed fishing places without the reservation. The organic act creating each territory preserved treaty rights enjoyed by the Indians. The enabling acts by which Washington and Wyoming were admitted to the

union, while differing somewhat in wording, are essentially the same.

It has several times been held that the treaty with the Yakimas established in favor of the Indians a perpetual servitude on the lands necessary for their use in taking fish at their accustomed fishing places without the boundaries of the reservation, and that lands conveyed by the United States or by the state are subject to this easement. *United States* v. *Winans,* 198 U. S. 371; *Seufert Bros. Co.* v. *United States,* 249 U. S. 194; *United States* v. *Taylor,* 3 W. T. 88, 13 Pac. 333. There is, then, no dissent to the proposition that under the treaty the Indians are entitled to an easement on, over, and across such lands as they must use in enjoying the full benefit of their fishing rights.

In connection with the question to be here determined, the case of *People ex rel. Kennedy* v. *Becker,* 241 U. S. 556, is of interest. Three members of the Seneca tribe of Indians were arrested by the authorities of the state of New York, charged with having in their possession certain fish in violation of the state conservation law. The defendants contended that as members of the Seneca tribe they were entitled to catch fish as they did, under a treaty made in the year 1797 between the Seneca nation and Robert Morris, which treaty or convention had been made under authority of the United States, and had been ratified by the senate and proclaimed by the president. By the treaty the Indians reserved to themselves and their heirs the privilege of fish-

ing and hunting on the land conveyed. Discussing this right, the court said:

"The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this nonexclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit a *prendre*, to the extent defined; that is not questioned. The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the State apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the State.

> It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (*Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Racehorse*, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the mem-

bers of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quo ad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wildlife. But the existence of the sovereignty of the State was well understood, and this conception involved all that

was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States* v. *Winans,* 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of "taking fish at all usual and accustomed places") "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

The court cited the Race Horse case, and upheld the authority of the state of New York, as sought to be exercised pursuant to its conservation law.

In the Cherokee Tobacco case, 78 U. S. 616, it was held that under the Federal internal revenue laws, a tax could be imposed upon tobacco grown by members of the Cherokee nation upon lands within the Cherokee reservation, notwithstanding

a provision of the treaty between the United States and the Cherokee nation exempting the members of the tribe from the payment of any tax on farm products, "which is now or may be levied by the United States on the quantity sold outside of the Indian territory." Referring to the conflict between the internal revenue laws and the Indian treaty, the court said: "Undoubtedly one or the other must yield. The repugnancy is clear and they cannot stand together." In the course of its opinion, the court said:

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the

> treaty were not an element to be considered. If a wring has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

It was held that the treaty provisions must yield to the Federal laws providing for the collection of taxes.

In the case of *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, the supreme court upheld the right of the state of California to proceed under its fish and game code, even though the enforcement of the act indirectly acted as a deterrent to the right to purchase fish taken on the high seas, and might incidentally affect interstate or foreign commerce.

In the case of *Patsone* v. *Commonwealth of Pennsylvania,* 232 U. S. 138, the supreme court upheld a statute of the state prohibiting the killing of wild game by aliens, and held that a citizen of Italy, who claimed exemption from the act by reason of a treaty between the United States and the Kingdom of Italy, by which the citizens of the two nations were assured the enjoyment of certain rights and privileges, was subject to prosecution under the state law, notwithstanding the provisions of the treaty. It was held that no provision of the treaty operated to deprive the states of the exercise of their powers to the full extent.

In the case of *Geer* v. *Connecticut,* 161 U. S. 519, the supreme court considered the rights of the states to control the export of wild game, saying:

> Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people

> which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected.

In the case of State v. Morrin, 136 Wis. 552, 117 N. W. 1006, the supreme court of Wisconsin affirmed a finding of guilty entered against a Chippewa Indian who trapped fish with gill nets, contrary to the state game law. The defendant relied upon a treaty between the United States and the Chippewa Indians, securing to the latter the "right to hunt and fish therein until otherwise ordered by the President." It was held that, pursuant to the Race Horse case and other authorities cited, the treaty did not operate to confer upon the defendant the right to fish in violation of the state game law. The court also observed that the defendant had acquired United States citizenship and was not living on the reservation, and for that reason was not entitled to claim the benefit of any treaty rights. The decision was based upon both grounds.

In the case of People v. Chosa, 252 Mich. 154, 235 N. W. 205, the supreme court of Michigan upheld the right of a state to enforce its game laws against Indians who attempted to hunt and fish on lands which their tribe had ceded to the United States, the Indians claiming such rights under a treaty with the Federal government. It was stipulated

that the defendants were entitled to enjoy "all the treaty rights and privileges" of the treaty. It was held that the defendants were "subject to the game laws of the state, on the lands covered by the treaties, to the same extent as the general public." The court also considered the question of the Indians' citizenship.

Under the authorities, it is clear that the state of Washington enjoys to the full the exercise of its police power, as an equal of the other states making up our Federal Union, including the original thirteen. Under the treaty, the members of the Yakima tribe are entitled to an easement to cross and use lands necessary to the enjoyment of their fishing rights at their old accustomed fishing places. Lands granted by the United States or the state remain subject to this servitude.

The minutes of the council between Governor Stevens and the Indians, at which council the treaty was made and executed, constitute a most interesting historical record, and show, as argued by appellant, that Governor Stevens, doubtless in the exercise of the utmost good faith, assured the Indians that the Federal government would faithfully carry out all terms and conditions of the treaty. To this day, the vast domain set apart to the tribe, comprising many acres of rich land, is enjoyed by the members of the Yakima tribe. Under the authorities, however, it must be held that as to the right of the Indians to fish at points without the reservation, which right was secured to them by the treaty "in common with citizens of the territory," such right has been limited by the statutes of the state of Washington governing the taking of fish and wild game, and that the decisions of

this court hereinabove referred to correctly declared the law, and should be followed in the case at bar.

As observed by the supreme court of the United States in the Cherokee Tobacco case, *supra*, consideration of such a situation as this, if a wrong has been done, pertains to the legislative department of the government, the correction of the wrong, if one exists, being "beyond the sphere of judicial cognizance."

The judgment appealed from is accordingly affirmed.

BEALS, J.

We concur:

MAIN, J.
STEINERT, J.
ROBINSON, J.
JEFFERS, J.

No. 28079

SIMPSON, J., Dissenting: I am unable to agree with the conclusion reached by the majority.

The pertinent provisions of the treaty are contained in subparagraph 2 of Article 3, which reads as follows:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; . . ."

All Indian Treaties are construed liberally by our courts in good faith and in favor of the Indians, because of the dominant position of the United States. *Worcester* v. *Georgia*, 31 U. S. 515; *United States* v. *Eagama*, 118 U. S. 375; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Jones* v. *Meehan*, 175 U. S. 1; *United States* v. *Winans*, 198 U. S. 371.

In the *Worcester case, supra*, the Supreme Court of the United States said:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guaranteed to the Indians, in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. *How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.*
>
> The question may be asked, Is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties? The inquiry is not, What station shall now be given to the Indian tribes in our country? but what relation have they sustained to us, since the commencement of our government? We have made treaties with them; and are those treaties to be disre-

garded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us? [Italics mine.]

In the Jones case, *supra*, that court again announced the rule of construction in the following language:

> In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and *that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.* [Italics mine.]

Rights not expressly granted in treaties with the Indians are reserved by them. *Winters* v. *United States,* 207 U. S. 564.

Having this rule in mind, let us view the situation surrounding the making of the treaty of 1855 entered into between the Federal Government and various Indian Tribes of the northwest, including the Yakimas, of which appellant is a member.

The meeting at which the treaty was arranged was held at the Council Grounds in Walla Walla Valley. It started May 18, 1855, and ended June 11, 1855. Governor Isaac I. Stevens of the Territory of Washington and General Joel Palmer of the Territory of Oregon represented the United States Government, and chiefs of the various tribes represented the Indians. Many speeches were made by those present, chiefly by Governor Stevens and General Palmer.

As a result of the treaty, 16,920 square miles of territory were ceded to the United States by the Indians and 1,233 square miles of land were retained by the Indians in two reservations.

Among other things, Governor Stevens told the Indians,

> We have near to our hearts the property of the Indians and the propositions to be made to you will prove it.

Speaking of the tracts to be retained by the Indians, he said:

> On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers; we want you and your children to learn to make ploughs, to learn

to make waggons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics; besides this we want on each tract a sawmill and a gristmill.

At another time he made the following statement concerning the care which the Government would exercise in order to help the Indians:

I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we *do* do it. If we think you have not done your part the agent will go to the chiefs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.

Again, he stated:

If we make a Treaty with you and our Great Chief and his Council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.

Governor Stevens made a definite statement relative to the Indian's right to fish in the following words:

> There is plenty of salmon on these reservations, there are roots and berries. There is also some game. You will be near the Great Road and can take your horses and your cattle down the river and to the Sound to Market * * *.
>
> You will be allowed to go to the usual places and fish in common with the whites * * * together with all outside the reservation.
>
> In the paper for the Kakamas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Piscouse, the Swan-wap-um and Palouse, the Yakimas and all the bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and fishing stations, which they well know and which I understand is satisfactory.
>
> * * * * *
>
> You will not be called according to the paper to move on the reservation for two or three years; then is secured to you your right to fish, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physicians and other things we have promised are secured; then the salaries, the houses, and the 10-acre farms of your chiefs are secured to him.
>
> * * * * *
>
> I will ask of Looking Glass whether he has been told of our Council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the

> reservation on lands not claimed by settlers, *that he can catch fish at any of the fishing stations* * * *. [Italics supplied.]

All of these statements were made in good faith by Governor Stevens at a time when the northwest was very much of a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hinderance from the federal or territorial governments. Regulations of fish and game were neither known nor dreamed of. The Indians had from time immemorial fished for salmon on the banks of the Columbia river. The catching of salmon was necessary for the sustenance of themselves and their families. Neither Governor Stevens nor the Indian Chiefs could possibly have visualized present-day conditions and present-day restrictions. They entered into the treaty agreement under situations which existed at that time. We should interpret and construe the treaty and the rights of appellant in the light of the surroundings present at that time.

Without any doubt whatever, Governor Stevens and the Indians signed the treaty with the definite understanding that the Indians should be forever allowed to catch salmon from the Columbia river without any restrictions whatsoever. We should so construe the treaty.

It may be conceded that there is an ambiguity contained in the treaty. However, that ambiguity, if there is one, should be resolved in favor of the Indians. *Winters* v. *United States*, 207 U. S. 564.

The state is not in a position, nor does it have the power, to modify or abrogate a treaty made by authority of the Congress of the United States.

Article I, Sec. 8, of the Federal Constitution, gives to the Congress power

> To regulate commerce with foreign nations and among the several states and with the Indian tribes.

The Enabling Act, 1 Rem. Rev. Stat. 333, Sec. 4, Second, recognized the position of the state in disclaiming all title to all lands

> * * * owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

There is a definite procedure insisted upon by the courts when the United States seeks to assert its position of dominance by abrogating or changing an Indian treaty, and that is by the passage of a clear and express Act of Congress which is of such a nature that the treaty and the act cannot in any reasonable view stand together. *Cope* v. *Cope*, 137 U. S. 682; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

I realize that the majority opinion is founded upon the following decisions of this court: *State* v. *Towessnute*, 89 Wash. 478, 154 Pac. 805; *State* v. *Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; *State* v. *Meninook*, 115 Wash. 528, 197 Pac. 641; and *State* v. *Wallahee*, 143 Wash. 117, 255 Pac. 94.

The last three cases cited are based upon the holding in the Towessnute case, *supra*. To my mind, that case is entirely wrong in principle, and

is founded upon an unjust assumption. It states that the Indians are mere occupants of the soil of America. Not so, they owned it as much or more than we do. Our ancestors took the lands from the Indians by conquest because they had firearms and were better able to destroy than the Indians.

Again, the opinion states, in speaking of the words "in common with citizens":

> These words were not used to give something to the white man, but to give something to the red man; not to give the Indian an advantage, but to save him from disadvantage.

Where did the white man get the land to give? The answer is that all of his rights were derived from the Indians. *United States* v. *Winans;* 198 U. S. 371.

The Indians surrendered their land to the white man in consideration of glowing promises of care and protection. When he gave his land away the red man reserved certain rights, among which was the right to fish at accustomed places, a right he had exercised for many, many generations.

It must be said, however, that at the time our former cases were decided, the court did not have the benefit of a report of the proceedings which led to the signing of the treaty under consideration.

The proper disposition of the question and interpretation of the treaty in question was made by the United States Supreme Court in *United States* v. *Winans, supra.*

That court held that the Yakima Indians had a right in the real property and an easement for certain express purposes in and to their usual and

accustomed fishing places on the Columbia River. The court stated:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.* And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The con-

tingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. *And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.* [Italics supplied.]

Cf., *United States* v. *Powers,* 16 F. Supp. 155; *United States* v. *Stotts,* 49 F. (2d) 619; *United States* v. *McGowan,* 62 F. (2d) 955.

The cases of *State* v. *Towessnute, State* v. *Alexis, State* v. *Meninock,* and *State* v. *Wallahee, supra,* should be reexamined and overruled.

If Governor Stevens was not sincere and the government secured from the Indians the large domain ceded to it by the making of promises it did not intend to keep, and did not keep, then fraud was practiced on the Indians, and the wrong done to them should be rectified.

On the other hand, if the promises made by Governor Stevens were made in good faith, as I am sure they were, then all of the facts relative to the making of the treaty should be considered in arriving at the intent of the parties.

The treaty should be upheld as construed in the Winans case, *supra,* and the judgment of the trial court reversed.

SIMPSON, *J.*

We concur:

MILLARD, *J.*

BLAKE, *C. J.*

EXHIBIT B

PETITION FOR WRIT OF HABEAS CORPUS IN COMPANION CASE

In the District Court of the United States for the Eastern District of Washington, Southern Division

No. 12

In the Matter of the Petition of The United States of America, In Behalf of Its Ward, SAMPSON TULEE, for a Writ of Habeas Corpus

PETITION

To the Hon. J. STANLEY WEBSTER, United States District Judge in and for the Eastern District of Washington:

Comes now the United States of America, in behalf of its ward, Sampson Tulee, by and through Sam M. Driver, United States Attorney for the Eastern District of Washington, duly authorized by the Attorney General of the United States, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, attorneys for your petitioner, and as grounds for this petition states:

I

That your petitioner is the guardian of Sampson Tulee, a ward of the United States of America, trust Yakima Indian, and a duly enrolled member of the Yakima tribe of Indians.

II

That by virtue of the provisions of paragraph 2 of article 3 of the Yakima Treaty of June 9,

1855 (12 Stat. 951) entered into between the United States of America and the Yakima tribe of Indians, Sampson Tulee, a ward of your petitioner, obtained a right to fish in the Columbia River without interference and without restriction by the State of Washington, or otherwise. That a certified copy of the minutes of the council at which said treaty was executed is hereto annexed, marked Exhibit D, and by this reference made a part of this petition.

III

That the salmon fishing season opened on the Columbia River approximately May 1, 1939. That several hundred members of the Yakima tribe of Indians are now fishing in said river, deriving their living from salmon fish taken from said river within the State of Washington. That the majority of said Indian fishermen, including Sampson Tulee, the ward of your petitioner, have refused to pay license fees to agents of the State of Washington, contending the State of Washington has no right to charge said Indians license fees or restrict their fishing operations on the Columbia River in any manner; and that a serious emergency now exists.

IV

That no relief is available to members of the Yakima tribe of Indians or to Sampson Tulee, the ward of your petitioner, in the courts of the State of Washington.

V

That on May 16, 1939, on information, a copy of which is hereto attached, marked Exhibit A, and hereby made a part of this petition, was filed in the Superior Court of the State of Washington in and for Klickitat County by the State of Washington against Sampson Tulee, ward of your petitioner, charging Sampson Tulee with a misdemeanor, namely catching and selling salmon fish commercially without having first obtained a license for the taking thereof, as required by the laws of the State of Washington.

VI

That a warrant of arrest on said information was issued out of the Superior Court of Klickitat County, Washington, directed against Sampson Tulee, your petitioner's ward; that he was thereupon arrested and is now actually, unjustly and unlawfully imprisoned and restrained of his liberty, and detained under color of the authority of the State of Washington, in the custody of one C. R. House, Sheriff of Klickitat County, in the Southern Division of the Eastern District of Washington; that a copy of said warrant of arrest is hereto attached, marked Exhibit B, and by this reference made a part of this petition.

That an affidavit of the ward of your petitioner, setting out the above facts, is likewise hereto attached, marked Exhibit C, and by reference made a part of this petition.

VII

That Sampson Tulee, your petitioner's ward, admits that on or about the 6th day of May, 1939,

and within the last three years immediately preceding the filing of the information on May 16, 1939, attached hereto, at Spearfish, in Klickitat County, Washington, he caught with a dip bag net certain food fish, to wit, salmon, and that he did then and there sell the same commercially without having first obtained a license for the taking thereof as required by the laws of the State of Washington.

VIII

That the statute of the State of Washington under which said information was filed in Section 5703, Remington's Revised Statutes of the State of Washington.

IX

That the location in the Columbia River where your petitioner's ward caught and took the salmon fish described in the information was and is one of the usual and accustomed fishing places of the Yakima tribe of Indians, described in paragraph 2 of Article 3 of the Yakima Treaty of June 9, 1855 (12 Stat. 951). That the provisions of paragraph 2 of article 3 of said treaty which your petitioner alleges have been violated by the State of Washington are as follows:

> The exclusive right of taking in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; * * *

X

That said statute, namely, Section 5703, Remington's Revised Statutes of the State of Washington, upon which said information is based, is unconstitutional and void insofar as it attempts to regulate, control and restrict fishing in the Columbia River by members of the Yakima tribe of Indians, including Sampson Tulee, the ward of your petitioner.

XI

That Sampson Tulee, your petitioner's ward, is unjustly and unlawfully held in custody and restrained of his liberty by the Sheriff of Klickitat County, Washington, in violation of the Constitution of the United States of America, and in violation of the Yakima Treaty of June 9, 1855 (12 Stat. 951).

XII

That under the Constitution and laws of the United States and the said Yakima Treaty of 1855, Sampson Tulee, ward of your petitioner, has the right to catch certain food fish, including salmon, and to sell the same commercially without first obtaining a dip bag net license or other license as required by the laws of the State of Washington.

Wherefore, your petitioner prays this Court to order the issuance of a writ of habeas corpus in this case addressed to C. R. House, Sheriff of Klickitat County, Washington, ordering and directing said Sheriff to have the body of Sampson Tulee, the ward of your petitioner, before your Honorable Court at a date to be fixed by said Court, at which time your petitioner prays the Court that

Sampson Tulee should be granted a discharge from said custody.

Your petitioner further prays that this Court issue an order staying all hearings and proceedings in the Superior Court of the State of Washington for Klickitat County with reference to the above mentioned case of State of Washington against Sampson Tulee, pending the hearing and determination of this petition.

SAM M. DRIVER,
LYLE KEITH,
KENNETH R. L. SIMMONS,
Attorneys for Petitioner,
United States of America.

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326 FEDERAL BUILDING,
Spokane, Washington.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss.:

Sam M. Driver, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified, and acting United States Attorney for the Eastern District of Washington, and makes this verification as such; that he has read the within and foregoing petition, knows the contents thereof, and believes the same to be true.

SAM M. DRIVER.

Subscribed and sworn to before me this 25th day of May 1939.

[CLERK'S SEAL] EVA M. HARDIN,
Deputy Clerk, United States District Court
for the Eastern District of Washington.

EXHIBIT C

DEMURRER TO PETITION FOR WRIT IN COMPANION CASE

In the District Court of the United States for the Eastern District of Washington, Southern Division

DEMURRER

To the Hon. J. STANLEY WEBSTER, United States District Judge in and for the Eastern District of Washington:

Comes now the State of Washington, in behalf of C. R. House, Sheriff of Klickitat County, State of Washington, by and through G. W. Hamilton, Attorney General of the State of Washington, T. H. Little, Assistant Attorney of the State of Washington, and Edgar H. Canfield, Prosecuting Attorney of Klickitat County, Washington, and demurs to the petition for a writ of habeas corpus in the above-entitled cause, and for grounds of demurrer alleges:

I

That the petition does not state any grounds sufficient to authorize the issuance of a writ of habeas corpus.

C. W. HAMILTON,
Attorney General, State of Washington,
T. H. LITTLE,
Assistant Attorney General,
State of Washington,
EDGAR H. CANFIELD,
Prosecuting Attorney of
Klickitat County, Washington,
Attorneys for Respondent.

Dated: June 6, 1939.
Filed June 8, 1939.

EXHIBIT D

ORDER IN COMPANION CASE DENYING WRIT OF HABEAS CORPUS

In the District Court of the United States for the Eastern District of Washington, Southern Division

No. 12

In the District Court of the United States for the of America, in Behalf of its Ward, Sampson Tulee, for a Writ of Habeas Corpus

ORDER

This matter coming on regularly for hearing on the 12th day of June, 1939, on the petition of the United States of America in behalf of its Indian ward, Sampson Tulee, for a writ of habeas corpus, directed to C. R. House, Sheriff of Klickitat County, Washington, and the demurrer of said sheriff to such petition, petitioner appearing by its attorneys Sam. M. Driver, United States Attorney for the Eastern District of Washington, and Kenneth R. L. Simmons, District Counsel, Irrigation Service of the Office of Indian Affairs, Department of the Interior, and the said sheriff appearing in person with the said Sampson Tulee in his custody and by his attorneys T. H. Little, Assistant Attorney General for the State of Washington, and Edgar H. Canfield, Prosecuting Attorney of Klickitat County, Washington, and the Court having duly considered said petition and demurrer and having heard the argument of coun-

sel, and being fully advised in the premises, now finds:

1. That the said petition of the United States of America and the demurrer thereto directly raise the question of whether or not the detention of Sampson Tulee, a Yakima Indian, by said sheriff under a statute of the State of Washington (Rem. Rev. Stat. Section 5703) violates his rights under the Yakima Indian treaty of June 9, 1855 (12 Stat. 951) and the Constitution of the United States and indirectly involves the treaty rights of all the other members of the Yakima Indian Tribe; and that because of the existence of exceptional circumstances of an emergency character, as stated in said petition, the case is a proper one for application to a United States District Court for a writ of habeas corpus and for assumption and exercise of jurisdiction on the merits by such court under the provisions of Title 28, U. S. C. A., Section 453 (Rev. Stat. Section 753).

2. That the right secured to the Indians under the said Yakima treaty of June 9, 1855, of taking fish at their usual and accustomed places in common with the citizens of the territory is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to reasonably regulate the taking of salmon and other fish from waters within its jurisdiction, and that the said statute of the State of Washington, Rem. Rev. Stat. Section 5703, is a proper and reasonable exercise by said state of such police powers.

3. That the detention of Sampson Tulee by C. R. House, sheriff of Klickitat County, Washington, as alleged in the petition herein, does not violate

any of his rights under the said Yakima treaty or the Constitution and laws of the United States.

It is now, therefore, Ordered that the demurrer of C. R. House, Sheriff of Klickitat County, Washington, to the petition of the United States of America for writ of habeas corpus in the above-entitled cause be, and the same is hereby, sustained and the said petition for writ of habeas corpus be, and the same is hereby, denied.

Dated this 22nd day of June, 1939.

J. STANLEY WEBSTER,
United States Judge for the Eastern District of Washington.

Presented by:

SAM M. DRIVER,
United States Attorney.

Approved as to form:

T. H. LITTLE,
Assistant Attorney General, One of the Attorneys for C. R. House, Sheriff.

(Endorsed): Filed June 22, 1939.

EXHIBIT E

OPINION FILED IN COMPANION CASE ON APPEAL FROM ORDER DENYING WRIT OF HABEAS CORPUS

United States, In Behalf of Tulee, v. *House, Sheriff,* No. 9340, Circuit Court of Appeals, Ninth Circuit, April 3, 1940

Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division; J. Stanley Webster, Judge.

Habeas corpus proceeding by the United States of America, in behalf of its ward, Sampson Tulee, against C. R. House, Sheriff of Klickitat County, Washington, to obtain the release of the ward from the custody of the sheriff. From a judgment denying the petition, the United States appeals.

Affirmed.

Sam M. Driver, U. S. Atty., and Lyle Keith, Asst. U. S. Atty., both of Spokane, Wash., and Kenneth R. L. Simmons, Dist. Counsel, Department of Interior, of Billings, Mont., for appellant.

G. W. Hamilton, Atty. Gen., State of Washington, T. H. Little, Asst. Atty. Gen., State of Washington, and Edgar H. Canfield, Pros. Atty., of Goldendale, Wash., for appellee.

Before Haney, Stephens, and Healy, Circuit Judges.

Haney, Circuit Judge.

Sampson Tulee, a Yakima Indian, was arrested, upon an information being filed in a state court in Klickitat County, Washington, and the petition before us seeks his release from the custody of the sheriff of that county.

On May 16, 1939, Tulee was charged in an information with having caught a salmon, a food fish, on May 6, 1939, with a dip bag net, and selling the same commercially, without having first obtained a license to do so, as required by 7 Rem. Rev. Stat. of Wash., sec. 5693. A warrant of arrest was issued, and Tulee was taken into custody by appellee.

The petition herein, after alleging such facts, alleged that Tulee was illegally restrained of his liberty because the Washington statute under which he was detained was unconstitutional and

void. The statute was alleged to be void because it violated paragraph 2 of Article 3 of the Yakima Treaty of June 9, 1855 (12 Stat. 951) which provides in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; * * *.

The petition admits that Tulee did in fact commit the acts described in the information. While the petition does not allege that the place where the fish were caught was on the Yakima Indian Reservation, it does allege that such place "was and is one of the usual and accustomed fishing places of the Yakima tribe of Indians."

The petition also alleges:

> That the salmon fishing season opened on the Columbia River approximately May 1, 1939. That several hundred members of the Yakima tribe of Indians are now fishing in said river, deriving their living from salmon fish taken from said river within the State of Washington. That the majority of said Indian fishermen, including Sampson Tulee, the ward of your petitioner, have refused to pay license fees to agents of the State of Washington, contending the State of Washington has no right to charge said Indians license fees or restrict their fishing operations on the Columbia River in any manner; and that a serious emergency now exists. It was further alleged that "no

relief is available to members of the Yakima tribe of Indians or to Sampson Tulee, the ward of your petitioner in the courts of the State of Washington."

The court below issued an order directing appellee to appear and show cause why the writ should not issue. Appellee filed a demurrer, on the ground that "The petition does not state any grounds sufficient to authorize the issuance of a writ of habeas corpus." The trial court found that the pleadings "directly raise the question of whether or not the detention of Sampson Tulee, a Yakima Indian, by said sheriff under a statute of the State of Washington (Rem. Rev. Stat. Section 5703) violates his rights under the Yakima Indian treaty of June 9, 1855 (12 Stat. 951), and the constitution of the United States and indirectly involves the treaty rights of all the other members of the Yakima Indian Tribe; and that because of the existence of exceptional circumstances of an emergency character, as stated in said petition, the case is a proper one * * * for assumption and exercise of jurisdiction on the merits by" the court below.

The court below held that the right secured to the Indians by the treaty "is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to reasonably regulate the taking of salmon and other fish from waters within its jurisdiction" and that the state statute in question "is a proper and reasonable exercise by said state of such police powers." This appeal is taken from the order denying the petition.

Notwithstanding the desire of both parties for a decision on the merits, we believe the rule to be applied is the one stated in *Mooney* v. *Holohan*, 294 U. S. 103, 115, 55 S. Ct. 340, 343, 79 L. Ed. 791, 98 A. L. R. 406, that—

> Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the state may still remain open.

This court has repeatedly invoked that rule with respect to petitioners held under the commitment of state courts. *Hall* v. *People of State of California*, 9 Cir., 79 F. 2d 132; *Phillips* v. *McCauley*, 9 Cir., 92 F. 2d 790, 791; *Milliken* v. *McCauley*, 9 Cir., 93 F. 2d 645; *Palmer* v. *McCauley*, 9 Cir., 103 F. 2d 300; *Frach* v. *Mass.*, 9 Cir., 106 F. 2d 820, 821. We think appellant should be accorded the same nondiscriminatory treatment heretofore accorded other petitioners, and is not entitled to special privilege or dispensation, because:

First. Although it is alleged in the petition that "no relief is available to members of the Yakima tribe of Indians or to Sampson Tulee, the ward of your petitioner, in the courts of the State of Washington", surely such an allegation is not binding on us when we know it to be false. The petition merely shows that an information was filed and that Tulee was arrested. It does not appear that Tulee has been tried; or if tried that he has been convicted; or if convicted, that he has appealed to the Supreme Court of Washington; or if he has appealed, that the judgment was affirmed; or, if

the judgment was affirmed, that he has sought review in the Supreme Court of the United States. From the allegations of the petition, and it is conceded by the parties, it is apparent that the remedy outlined is still available to appellant. Furthermore, the Washington statutes relating to habeas corpus (3 Rem. Rev. St. of Wash. secs. 1063–1085) may afford appellant another remedy.

It is apparent that appellant's remedy is in the state courts. What he actually means by his allegation, quoted above, is that he believes that he cannot get a favorable decision in the state courts, because of previous construction of the treaty by the Supreme Court of Washington. Whether such court properly construed the treaty is of no moment here, because a writ of habeas corpus may not be used as an anticipatory appeal. *Rumely* v. *McCarthy*, 250 U. S. 283, 288, 289, 39 S. Ct. 483, 63 L. Ed. 983; *Henry* v. *Henket*, 235 U. S. 219, 228, 229, 35 S. Ct. 54, 59 L. Ed. 203.

Second. Appellant concedes that he is not entitled to special dispensation merely because the United States appears in the proceeding. See *United States ex rel.* v. *Tyler*, 269 U. S. 13, 46 S. Ct. 1, 70 L. Ed. 138.

Third. Appellant contends that the instant case falls within the exception to the general rule stated and applied in *Mooney* v. *Holohan, supra.* The exception is stated in *Urquhart* v. *Brown*, 205 U. S. 179, 182, 27 S. Ct. 459, 460, 51 L. Ed. 760, as follows:

> * * * The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of

> the state are those of great urgency, that require to be promptly disposed of; such, for instance, as cases "involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations." * * *

In *Urquhart* v. *Brown, supra,* in which this exception was stated, and in which the Supreme Court applied the general rule, the appeal was taken from the Circuit Court of the United States for the Western District of Washington.

Since a demurrer was filed to the petition, only the facts stated in the petition, and those of which we may take judicial notice are before us. The only allegations bearing on the question are:

> * * * That several hundred members of the Yakima tribe of Indians are now fishing in said river, deriving their living from salmon fish taken from said river within the State of Washington. That the majority of said Indian fishermen, including Sampson Tulee, the ward of your petitioner, have refused to pay license fees to agents of the State of Washington, contending the State of Washington has no right to charge said Indians license fees or restrict their fishing operations on the Columbia River in any manner; and that a serious emergency now exists.

It is obvious that neither the "authority" or "operations" of the United States is involved. Appellee does not challenge any authority of the United States, or any action thereof, in any manner. The thing challenged is the authority of the state, not of the United States. As said in *United States, ex rel.,* v. *Tyler, supra,* 269

U. S. 17, 46 S. Ct. 2, 70 L. Ed. 138, that insofar as the questions raised "involve treaty or constitutional rights" the state courts "are as competent as the federal courts to decide them" and:

> * * * In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him.

It is likewise clear that no operation of the United States is involved. What is in question is the action of an Indian and a state. No officer of the United States is restricted from carrying out his duties, as was the case in *Ohio* v. *Thomas,* 173 U. S. 276, 19 S. Ct. 453, 43 L. Ed. 699, and *Boske* v. *Comingore,* 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846.

The obligations or relations of the United States with a "foreign nation" are not here involved because Indian tribes "are not foreign nations." *Jones* v. *Meehan,* 175 U. S. 1, 10, 20 S. Ct. 1, 5, 44 L. Ed. 49.

> The North American Indians do not, and never have, constituted "nations" as that word is used by writers upon international law, although in a great number of treaties they are designated as "nations" as well as tribes.

Montoya v. *United States,* 180 U. S 261, 265, 21 S. Ct. 358, 45 L. Ed. 521.

Appellant relies on *In re Race Horse,* C. C. Wyo., 70 F. 598, 604, and *Ward* v. *Race Horse,* 163 U. S. 504, 505, 16 S. Ct. 1076, 41 L. Ed. 244. The question there presented was whether the court had jurisdiction at all. Here, unquestionably, the court below had jurisdiction. 28 U. S. C. A. sec. 453. The question is not whether jurisdiction existed, but the propriety of its exercise.

The bare allegation in the petition "that a serious emergency now exists" does not aid appellant. No facts are alleged showing what such "serious emergency" is. Imprisonment of any human being is a "serious emergency" to the prisoner, but that clearly is insufficient. Such allegation is a conclusion of law, and if we accept it here, logic compels us to accept it in the numerous cases presented to us by petitioners held under commitments of the states in this circuit. In *Hall* v. *People of State of California,* 9 Cir., supra, petitioner alleged that he was imprisoned in violation of the Constitution and laws of the United States

> and unless a writ of habeas corpus issue forthwith the judgment of conviction and sentence to the penalty of death will be carried out * * * to the irremediable damage and loss of life of this petitioner.

It is difficult to conceive of a more serious emergency than was presented in that case, yet it was insufficient to bring the exception into operation. We believe the bare allegation of a "serious emergency" is wholly insufficient here, for by merely inserting a like bare allegation in his petition, every petitioner detained by virtue of a state proc-

ess could invoke and be entitled to consideration of his petition in a federal court, thus making inapplicable the general rule.

Independently of the foregoing, we think the allegation of a "serious emergency" is a conclusion of law. The application for the writ is required to be made by complaint in writing "setting forth the *facts* concerning the detention of the party restrained." [Italics supplied.] 28 U. S. C. A. sec. 454. No facts are alleged showing what the "serious emergency" is. The statute requires such facts for "more averments of conclusions of law are necessarily inadequate." *Craemer* v. *Washington State*, 168 U. S. 124, 129, 18 S. Ct. 1, 3, 42 L. Ed. 407.

In this connection the court below found that there were, here, exceptional circumstances of an emergency character "as stated in said petition." As thus qualified the finding is of no weight here, since, as we have held, the petition states no exceptional circumstances of an emergency character.

Finally, appellant frankly admits that an agreement was reached between the United States and the State of Washington whereby the latter would "hold in abeyance some 70 other cases against other Indian residents * * * providing the United States would immediately test out the right of the State to license Indian fishermen, in the federal Courts." It would seem, therefore, that the emergency, if any, which previously existed, ended before the instant petition was filed.

The order denying the writ is affirmed.

[110 F. (2d) 797–801.]

EXHIBIT F

OPINION IN RELATED CASE NOT YET REPORTED

Makah Indian Tribe, et al. v. *B. F. McCauly, et al.*, No. 218

United States District Court, Western District of Washington, Northern Division

Memorandum Decision, filed May 1, 1941

Vanderveer, Bassett & Geisness, Seattle, Washington, Attorneys for Plaintiffs.

Hon. Smith Troy, Attorney General of the State of Washington, Olympia, Washington; Hon. T. H. Little, Asst. Attorney General of the State of Wash., Olympia, Washington; attorneys for Defendants.

BOWEN, *District Judge:*

Motion for judgment on the pleadings which consist of the complaint and answer.

The complaint alleges among other things that plaintiff Indians by the Makah Indian Treaty of 1859 were secured in their right to fish at their usual and accustomed grounds and stations including the Hoko River in the Olympia Peninsula of the State of Washington, but that the defendant state officers since 1933 have interfered with and prevented such rights by threatening to arrest plaintiff Indians and to confiscate their fishing gear, and that the defendants will, unless enjoined by this court, continue to so prevent plaintiffs from

enjoying such fishing rights in the future, all in violation of such treaty.

By their answer defendants allege (1) that this court is without jurisdiction of the subject matter; (2) that the defendants are state officers, that their acts complained of are in pursuance of a state statute, that they are not the real parties in interest but that the real party in interest is the state of Washington (which it is argued by reason of the 11th Amendment cannot be sued in this action); (3) that plaintiff Indians are wards of the United States Government and have no capacity to sue except as such wards by the United States Attorney; and (4) that plaintiffs' complaint fails to state a cause of action upon which relief can be granted (under which issue defendants argue and plaintiffs deny that the Makah Indian Treaty is invalid as against the asserted authority of defendant state officers to enforce the state fishing laws, which are nowhere specially set up in the pleadings).

1. This court has jurisdiction of the subject matter of this action because it involves plaintiffs' asserted rights under an Indian treaty with the United States of the alleged value of more than $3,000.00 exclusive of interest and costs, plaintiffs' allegations of such jurisdictional amount being admitted by defendants' answer.

2. This is an action against state officers for relief against their acts alleged to be unlawful because in conflict with plaintiffs' fishing rights under the Makah Indian Treaty with the United States. "The action is not one in its essential nature and effect against the state to enforce a state liability, and so is not repugnant to the Eleventh

Amendment" to the U. S. Constitution. *Sampson* v. *Brennan,* Cause No. 74 of this Court, Memorandum Decision filed August 3, 1939. See also *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10; Ex parte Young, 209 U. S. 123; Ex parte New York, 256 U. S. 490, 500.

3. "Plaintiff Indians being citizens of the United States (8 U. S. C. A., Sec. 3) may as other citizens employ counsel of their own choice. They may also in a federal court institute and prosecute an action to enforce their rights under the Constitution, laws or treaties of the United States." *Sampson* v. *Brennan, supra.* See also *Deore* v. *New York,* 22 F. (2d) 851; *Y-Ta-Tah-Wah* v. *Rebock,* 105 Fed. 257, 259; *Lane* v. *Santa Rosa,* 249 U. S. 110, 113-114.

4. The final issue presented is whether the complaint states a cause of action upon which the requested relief can be granted. In the briefs and at the oral argument counsel have treated and the court will likewise treat this issue as raising the question of the validity of Article IV of the Makah Treaty providing that:

> The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * together with the privileges of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shellfish from any beds staked or cultivated by citizens.

Defendants emphasize that although the right to fish (the only right here in question) is by the treaty *"further secured"* to the Indians, such right

is so secured only *"in common with all citizens"* of the United States, and therefrom defendants argue that just as are other citizens' fishing rights, so are such rights of the Indians, subject to all reasonable police power legislation and regulation by the state for the preservation and protection of fish and game, that such police power reserved to the people and exercised for them by the state is paramount to all conflicting treaty provisions, that the state fish and game laws are police measures which apply not only to the Indians but alike to all citizens, Indians and others, and that this conflicting treaty provision securing to the Indians their fishing rights must yield to such state police laws.

But does not that argument assume that the Treaty *granted* instead of "further secured" to the Indians their fishing rights? Obviously such an assumption is contrary to the fact indisputably established by history and common knowledge. This nation by conquest and treaty acquired the land from the Indians, but before and after every conquest and conflict and after many a treaty the Indians asserted and enjoyed their ancient right to hunt and fish. That ancient right, of all the Indian rights of remotest antiquity, has by this nation and the Indians been regarded as the most sacred right of the Indians and has seldom ever been questioned. It is believed that, before the Stevens treaties of which the Makah Treaty is one, the Indians' right to fish in the domain now included in this state never was questioned by public authority or at all, and in this instance it is a most notable fact that subsequent to this Treaty the right to fish "further secured" to the Indians

by this Treaty was unfailingly recognized and respected by all until the year 1933, a continuous period of about 75 years.

This Court is of the opinion that as contended by plaintiffs the answer to this question as to the Treaty's validity turns upon the sounder theory that the Treaty *granted* nothing to the Indians, but that the Treaty in truth and in fact merely reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed. This conclusion is rendered inescapable by a fair consideration not only of Article IV, supra, but also of all the other provisions of the Treaty. Nowhere in the Treaty can be found a *conveyance* by the United States to the Indians of any property, except the money consideration to be paid by the Government for the lands and rights in the Treaty conveyed by the Indians to the Government. In the Treaty the United States is the sole grantee and the Indians exclusively are the grantors of all the property covered by the Treaty, except that money consideration, and with that single exception the Treaty *conveyed* no property to the Indians. Upon consideration of the conveyance by the Indians of their lands to the Government, the United States by Article IV, supra, solemnly recognized and guaranteed that "The right of taking fish * * * *at usual and accustomed grounds and stations is further secured to said Indians* * * *." [Italics supplied.] So it is readily seen the Treaty does not even purport to *grant* any fishing rights. It merely "*further secured*" to the Indians what fishing rights they already had, at their "usual and accustomed grounds and stations."

That conclusion is further fortified by the following statements of the Indian chiefs and headmen and of Governor Stevens when they negotiated this Treaty in 1855:

> Kalchote of Neah Bay said that he thought he ought to have the right to fish and take whale and get food where he liked. Keh-Tchook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave the salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing. (Affidavit of Charles E. Peterson et al. filed October 1, 1940.)

And so by stating the foregoing objects and purposes of the Treaty, the spokesmen for its High Contracting Parties construed it as a solemn declaration and guarantee reserving to the Indians for the Treaty's duration, which those spokesmen undoubtedly then thought would be for all time to come, the sacred fishing rights of the Indians already and from time immemorial enjoyed by them. How then can it be said that the Treaty *granted* any Indian fishing rights? It did not. It merely *reserved* and guaranteed to the Indians these fishing rights which they always before had possessed and enjoyed.

That construction also leads to a denial of defendants' further contention that by the phrase "in common with all citizens of the United States"

the treaty provision for the Indians' benefit was intended to be subject to future state police regulation of fish and game, because other citizens' fishing rights are subject to such police regulation. But it is far more probable that by that phrase the Indians merely indicated their willingness to share their preexisting fishing rights with all citizens, and that the Indians were willing to continue to recognize other citizens' fishing rights then known to the Indians. There is no allegation or showing in this case that the Indians anticipated the possibility that in the future other citizens might have their fishing rights limited by the exercise of state police power or that other citizens' fishing rights as the Indians knew them when the Treaty was made might in any way be changed. Nor is there allegation or proof here that the Indians knew of or appreciated the present or possible future existence of any state sovereignty which might attempt to limit the fishing rights of either Indians or other citizens. The only sovereignty, other than their own tribal authority, whose power to regulate fishing was understood by the Makah Indians, very likely was our national government, to them the "Great White Father," with whom they were then negotiating a treaty to reserve and further secure to them their fishing rights at their "usual and accustomed" places.

This nation never acquired for its people by conquest, and did not by the Makah Treaty acquire, the pre-existing ancient Indian fishing rights on which the asserted police power could operate. The police power here invoked by defendants does not apply to subjects, such as Indian fishing rights, not possessed by the people, state, or nation. The

cases of *Kennedy* v. *Becker*, 241 U. S. 556, and *Ward* v. *Race Horse*, 163 U. S. 504, limiting or denying Indian treaty fishing rights, relied upon by defendants, are distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the Indians anticipated the future sovereign power to limit.

Those cases are distinguishable upon the further ground that the grant of citizenship to Indians by the Act of June 2, 1924 (8 U. S. C. A., Sec. 3), enacted subsequent to decision of those cases, definitely withdrew the Indians' tribal and other property, such as fishing rights, from the operation of police power affecting the rights of other citizens. In effect, it was so held in *Mason* v. *Sams*, 5 F. (2d) 265 (D. C. Wash.), where Judge Cushman for the court at pages 257 and 258 said:

> These Indian plaintiffs have been, by the Act of June 2, 1924 (43 Stat. at Large 1923–1924, part 1, page 253, c. 233), made citizens of the United States, with this proviso:
>
> "That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."
>
> Under the rule favoring the Indians in the interpretation of treaties and laws affecting them, already alluded to, any fishing rights of plaintiffs under the treaty are preserved by this proviso.

This Makah Treaty should have applied to it in favor of the Indians the rule of *Nielson* v. *Johnson*, 279 U. S. 47, 51–52, applicable to Indian and other treaties, that:

> Treaties are to be liberally construed so as to effect the apparent intention of the

> parties. (Citing cases.) When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred (citing cases), and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments. (Citing cases.) When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. (Citing cases.)

And the Supreme Court has held that an Indian treaty should be liberally construed so as to give effect to the meaning attached to the treaty by the Indians themselves. So in *Seufert Brothers Company* v. *United States*, 249 U. S. 194, 198, quoting in part from *U. S.* v. *Winans*, 198 U. S. 371, the court said:

> We will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1.

No exception is made of the sate police power in the rule above quoted from *Nielsen* v. *Johnson*,

supra, when the court said "* * * as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed (i. e., liberally) is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments."

The decision of this court upon the motion for judgment on the pleadings is that judgment should be entered for plaintiffs in accordance with the prayer of their complaint.

An order may be settled upon notice or stipulation.

JOHN C. BOWEN,
United States District Judge.

Due, legal, and personal service of the within and foregoing appendix to the statement as to jurisdiction and receipt of a true copy thereof is hereby acknowledged this 30th day of June 1941.

SMITH TROY,
Attorney General for the State of Washington.
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Assistant Attorney General
for the State of Washington.

In the Supreme Court of the United States

OCTOBER TERM, 1941

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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